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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	

JOINT OPPOSITION TO PETITIONS FOR RECONSIDERATION

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SUMMARY

The many petitions for reconsideration filed in this proceeding testify to the complex task the Commission has as it struggles to establish reasonable and sustainable universal service programs while not compromising the 1996 Act's goal of local telecommunications competition. Comcast and Vanguard remain very concerned that the FCC, in its haste to fashion a universal service program that goes into place on January 1, 1998, has overlooked substantial legal and potential discrimination issues as its universal service programs effect Commercial Mobile Radio Service providers.

The Eighth Circuit's recent affirmation of the FCC's sole jurisdiction over CMRS and CMRS interconnection creates a conflict between the court's view of the significance of Sections 2(b) and 332 (creating wholly interstate jurisdiction over CMRS) and the FCC's determination in the Universal Service Order that CMRS providers should pay into state universal service programs prior to any FCC determination that CMRS is a substitute for landline service. The FCC should immediately resolve this conflict consistent with a straightforward reading of Sections 2(b), 332 and 254 that takes into account Congress' actions in 1993 as well as Congress' expressed intent in 1996 not to modify the CMRS legal framework.

Given the FCC's extremely tight timetable for the submission of universal service Worksheets as well as the potential criminal penalties associated with inaccurate reporting, the FCC has a responsibility to provide adequate guidance to CMRS providers that have never faced such overwhelmingly substantial and detailed regulatory reporting requirements that are ill-suited to adaption to CMRS operations. Many, if not all, CMRS providers believe that all their telecommunications revenues are properly classified as interstate. Based on the lack of timely FCC clarification, CMRS carriers may erroneously classify

their traffic and thus related revenues. Also, lack of FCC guidance will mean that the USF administrator will receive Worksheets that reflect inconsistent methodologies and results, with the effect that some contributors will pay too little and others too much in contravention of Section 254's direction that contributions be "equitable."

The FCC must also address the fundamental discrimination present in its USF programs. No consideration has been given, for example, to the competitive impact of USF requirements on vastly disparate market segments such as CMRS, ILECs and IXCs. While ILECs and IXCs can cushion the impact of USF program assessments, to CMRS providers, they are simply a new tax that must be collected from end user customers that may damage CMRS' capability to provide services competitive to those of other carriers. To begin to address this legitimate concern, the FCC must *require* that all carriers pass through their universal service contributions so that they are reflected on end user bills and so that the manner in which carriers finance the USF obligation will not be a major distinguishing factor between carriers.

Finally, the FCC must reject the rural LEC petitions that demand continuing (and growing) subsidies for their expenses, up to and including competitor funding of their representation before the FCC. These companies have not demonstrated any entitlement to recovery of embedded investment costs, and the FCC and state commissions should not hesitate in imposing forward-looking cost models on rural LEC operations. Rural arguments LEC arguments that portable USF subsidies are inconsistent with Section 254 are unsubstantiated and rural LEC attempts to cast the bedrock principle of "competitive neutrality" as favoritism must be soundly rejected.

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JOINT OPPOSITION TO PETITIONS FOR RECONSIDERATION

Comcast Cellular Communications, Inc. ("Comcast") and Vanguard Cellular Systems, Inc. ("Vanguard") hereby file a joint opposition to petitions for reconsideration filed on July 17, of the FCC's May 8, 1997 Report and Order ("Order") in the above-captioned docket.

I. INTRODUCTION

In its Order, the Commission struggled to establish reasonable and sustainable future universal service programs while at the same time attempting to encourage local competition in all markets. Judging from the depth and breadth of the concerns expressed in the many petitions for reconsideration filed, however, the FCC has substantial matters to reconsider prior to implementation of the program.

For example, only one day after reconsideration petitions were filed, the Eighth Circuit vacated large portions of the first part of the FCC's competition trilogy, the Local Competition Order.[1/] Much of what the FCC determined in the Universal Service Order

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1/ *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Docket Nos. 96-98, 95-185, FCC 96-325, released August 8, 1996 ("Local Competition Order"), *rev'd in part*, was predicated on the *Local Competition Order's* jurisdictional framework that now largely has been overturned.[2/]

The Eighth Circuit took another very significant action in determining that, in light of the 1993 amendment of Sections 2(b) and 332, the FCC had special jurisdiction over the interconnection arrangements between incumbent LECs ("ILECs") and Commercial Mobile Radio Service ("CMRS") providers. These court determinations ought to inform the FCC's future actions on the remaining aspects of the trilogy. At a minimum the FCC should pause in its universal service implementation program to examine what the Eighth Circuit's rulings mean for a sustainable universal service program and adjust for these effects.

Also on the day after petitions for reconsideration were filed, the FCC released an important order on Universal Service funding and support, denominating the National Exchange Carrier Association ("NECA") as the temporary USF administrator and delineating a process for the estimation, billing and collection of program funds.[3/] Attached to the NECA Order was a draft worksheet that all telecommunications carriers with more than *de minimis* revenues must fill out and file with NECA's USF subsidiary by September 1, 1997. The FCC subsequently issued a public notice and a correcting public

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Iowa Utilities Board et al. v. FCC, No. 96-3321, slip op. (8th Cir. July 18, 1997).

2/ Whether correctly or not, the Eighth Circuit determined as a general matter that the FCC did not have the authority to promulgate federal pricing rules under sections 251-252 of the 1996 Act having the effect of constraining state commission pricing determinations. In contrast, in the Universal Service Order, the FCC determined it had the authority to assess contributions from intrastate telecommunications under the school, library and rural health care program.

3/ *See*, changes to the Board of Directors of the National Exchange Carrier Association, Inc.: Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, CC Docket Nos. 97-21, 96-45, FCC 97-253, released July 18, 1997 ("NECA Order").

notice notifying that the worksheet was approved by the Office of Management and Budget and must be fully and accurately presented or carriers may be subject to criminal penalties.[4/]

The worksheet filing process places parties with pending petitions in an impossible situation given the apparent timing of the worksheet filing, and the initial assessment and program billing cycle. Comcast/Vanguard and other CMRS providers demonstrated in their petitions that the Universal Service Order did not adequately consider the question of CMRS' jurisdiction and the language of Section 332 and consequently that the FCC wrongly decided that there was no legal issue posed by state universal service assessments upon CMRS providers. This also has become a very serious practical concern as the FCC USF process has apparently taken on a life of its own. Carriers with serious outstanding legal issues such as jurisdiction over CMRS revenues are left to their own devices to determine how to complete the Worksheet.

One example of the dilemma CMRS carriers face is that the Worksheet requires carriers to supply a total revenue figure, a percentage interstate/international revenue as well as an interstate/international revenue figure. An intrastate revenue percentage is plainly calculable from this information. Without some direction regarding what the Commission expects, CMRS providers will be forced to guess what percentage of their revenues should be treated as intrastate or apparently face penalties either for not filling in

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4/ *See* FCC August 4 and August 11 Public Notices, "FCC Announces Release of Universal Service Worksheet, FCC Form 457, CC Dkt. Nos. 97-21, 96-45," released August 4, 1997 and "FCC Announces Non-Substantive Changes to Universal Service Worksheet Instructions Released on August 4, 1997, CC Dkt. 97-21, 96-45," DA No. 97-1671A, released August 11, 1997. The appearance of a Worksheet with the overwhelming degree of detail and depth of reporting requirement is unparalleled for the CMRS industry, particularly given the lack of legal clarification and the short timeframe for response.

information or guessing wrongly. While the Parties understand that on August 15 the FCC released an Order noting that carriers should make a good faith estimate, this Order does not revoke the potential penalties nor does it make companies like Comcast and Vanguard, who want to provide the Commission with correct information, with any real guidance. Further, inconsistency in the manner in which information is presented for NECA tabulation is in no one's interest.

Moreover, Comcast and Vanguard have argued that CMRS is inherently and jurisdictionally interstate under the framework created by Congress in 1993 and confirmed by Congress in the 1996 Act. Thus, 100% of all telecommunications revenues earned by CMRS providers are properly classified as interstate revenues.[5/] Under the present state of legal uncertainty, are CMRS providers to make an estimation of a split that does not accord with the law or should CMRS providers wait until the FCC addresses this issue in the pending petitions?[6/] How would CMRS providers get their money back from state funds if they are paid in error but pursuant to FCC instruction? These questions should be answered prior to proceeding with the filing of Worksheets by CMRS providers.[7/]

5/ This situation is similar to the jurisdiction the FCC possesses over interstate access and interstate access revenues earned by ILECs, except that as to access services, Congress did not amend Section 2(b) to remove state jurisdiction over intrastate access services.

6/ Comcast and Vanguard note that a coalition of 131 rural LECs filed a "Joint Emergency Petition for Partial Stay" of the FCC's Universal Service Order seeking a stay of the portions of the Order they view as wrongly decided. Their stay request would be effective up to and including the time the FCC takes action on their petitions for reconsideration. If the FCC grants this stay motion, it should extend the scope of the stay to the issues outstanding in all pending petitions for reconsideration.

7/ Comcast and Vanguard recognize that the FCC staff and the NECA administrators have a narrow window of time to deal with critical issues if the January 1, 1998 collection timetable is adhered to. It would certainly be possible, however, to

II. THE COMMISSION MUST ADDRESS THE FUNDAMENTAL DISCRIMINATION PRESENT IN THE UNIVERSAL SERVICE FUNDING PROGRAM

As the CMRS petitioners have demonstrated, a fundamental discrimination exists in the Universal Service funding program.[8/] Section 254(d) provides that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an *equitable and nondiscriminatory basis*, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[9/] This statutory standard requires the Commission to conduct a searching review of the funding mechanism it adopts to ensure that every aspect of the rules are equitable — not "equal" — and do not discriminate against particular industry segments.

The *Order's* assumption that there is no discrimination in contribution requirements is flatly contradicted by the way interexchange carriers ("IXCs") and ILECs are treated under the rules. In this regard, the FCC's universal service rules suffer from similar discriminatory features found in the recently-overturned Kansas Universal Service Program. The Kansas Commission's assessment scheme was discriminatory as between CMRS providers and IXCs because, while both carriers' revenues were assessed at the same

continue Worksheet collection for non-CMRS providers and delay receipt of CMRS provider Worksheets in order to provide necessary guidance without imperiling the program's overall timetable. Indeed, the FCC has not hesitated to give LECs additional time to respond to data requests related to the development of high cost data. *See Order* by Chief of the Common Carrier Bureau, released August 14, 1997, DA No. 97-1728.

8/ *See e.g.* Joint Petition of Comcast and Vanguard at 12-14. Petition of Cellular Telecommunications Industry Association at 10; Petition of Airtouch Communications, Inc. at 4; Petition of Nextel Communications, Inc. at 16; Petition of ProNet, Inc. at 3.

9/ 47 U.S.C. § 254 (*emphasis added*).

rate, the IXCs were to realize a benefit, in the form of a 30 percent reduction in access charges and resulting demand stimulation effects, not realized by wireless carriers. Likewise, under the Commission's rules, IXCs and ILECs are afforded offsets in their contribution requirements that CMRS providers, resellers and CLECs simply are not.[10/] As Comcast and Vanguard explained in their Petition, this not only has competitive impacts that were not considered by the FCC, this discriminatory impact has to be remedied prior to any collection of funds.[11/] The Joint Petitioners are sensitive to the Commission's desire to implement the universal service provisions of the 1996 Act in a timely manner. However, requiring carriers to submit a universal service worksheet with substantial financial and criminal liabilities attached prior to providing resolution of critical legal issues is arbitrary and unreasonable.

III. THE FCC MUST BE EXPLICIT IN HOW ASSESSMENTS ARE COLLECTED AND PASSED ON

As the Petitioners stated in their Petition, under the present framework, the only way to begin to address the competitive impact of the universal service levy is to *require* that USF contributions be an explicit line item on bills passed onto customers. The Commission refused to tackle the competitive implications of the subsidy and collection

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10/ *See* Joint Petition at 14-15.

11/ See Joint Petition at 17-19. A critical aspect of the Petitioners' concern relates to the *Order's* apparent allowance of state USF programs plainly inconsistent with the FCC's own judgments about USF program eligibility. Indeed, the *Order* and, more importantly, the FCC rules are silent on the question of whether states may impose wireline USF program funding obligations on CMRS providers without regard to whether that state permits CMRS providers to be eligible for state universal service funds. Further federal Lifeline and Link-Up programs must make specific changes to their eligibility criteria to be consistent with the principle of competitive neutrality adopted both by the Joint Board and the FCC.

mechanisms when it determined that pass-throughs should be optional and warned that it wishes "to ensure that carriers include complete and truthful information regarding the contribution amount" on their bills.[12/] The marketplace reality is that deep-pocket carriers can off-load the lion's share of their contributions and decide not to pass USF costs onto consumers. Inevitably, such determinations will force other providers to follow suit. Requiring explicit USF contribution pass-through would at least ensure that the manner in which carriers finance the USF will not be a distinguishing factor between carriers. In addition, carriers are acting as agents of the government in collecting USF from their customers. The FCC has the responsibility to let its agents know what wording is acceptable to describe the nature of the assessment on a customer's bill. The FCC must make this formulation known so that carriers are not forced to guess as to what the FCC believes is a "fair characterization" of the charge.

In that regard, the Commission thus far has not recognized that the universal service assessment is more in the nature of a tax than a regulatory fee. A tax raises revenue to benefit the public interest whereas a fee bestows a benefit upon the payee which is not shared by other members of society. Throughout Section 254, the statutory language explains that the assessment is generally for "protection of the public interest." Furthermore, it is evident from the benefits bestowed upon rural consumers and the provision of funding to schools, libraries that the carriers required to contribute to the fund will not be the only ones that benefit from the assessment, if the carrier even benefits at all. Moreover, the definition of a tax, according to Black's Law Dictionary (Sixth Edition), is a non-voluntary and enforced payment, the purpose of which is to defray

12/ *See Order* at ¶ 855.

public expenses. The definition of a "tax" also includes assessments according to Black's, which further explains that the right to impose an assessment has its foundation in the taxing power of Congress. Correctly characterizing the assessment has wide ranging implications upon the operations of business concerns, including federal and state tax implications.[13/]

IV. THE RURAL LEC PETITIONS FOR RECONSIDERATION DEMONSTRATE A MONOPOLY ENTITLEMENT MINDSET WHICH IS INCONSISTENT WITH SECTION 254

Several rural LEC petitions demonstrate a continuing monopoly entitlement mindset that is contrary to Section 254 and the pro-competitive goals of the 1996 Act.[14/] For

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13/ The practical implications of classifying the assessment as a tax will depend on whether the tax will be passed onto customers or whether the tax will simply be borne by the telecommunication service providers. Assuming the tax will be borne by the telecommunications provider (due to detrimental business repercussions in doing otherwise), the tax may or may not be deductible in calculating adjusted federal taxable income or the state taxable income base. This is due to the limitation upon deductibility of taxes pursuant to Internal Revenue Code §275 which prohibits deducting federal income taxes, as well as the fact that most states do not permit the deductibility of federal income taxes. Even assuming that the assessments would be deductible based on the fact that it is imposed upon gross receipts rather than income, the taxpayer that must pay the entire tax without passing it on to its customers will never recover the total amount of the payment in the form of a deduction. This is so because any deductible amount merely reduces a taxpayer's overall tax liability by the deduction multiplied by the taxpayer's effective tax rate. Furthermore, such a payment has ramifications beyond the taxpayer's tax liability; it profoundly affects the cash flow of every retailer subject to the assessment, so much so that it may place an otherwise marginally profitable retailer among the ranks of those that the statute seeks to assist.

However, if the telecommunication service provider would be obligated to pass the assessment onto the customer in the form of a surcharge, then the resulting income (if it is determined that such collectable amounts is income to the provider) would be offset by an identical deduction which would be generated by the payment of the assessment to the Fund. This has a net effect of zero on the retailer's tax liability as well as on its cash flows (although it still may have an effect on demand for the carrier's services).

14/ *See e.g.* Petition of Alaska Telephone Association at 2; Petition of Fidelity Telephone Company at 4; Petition of USTA at 10; Petition of Rural Telephone Companies example, several rural LEC petitioners attack the 115 percent cap on corporate operations expenses as unfair or unreasonable.[15/] Some rural LECs go so far as to demand an exemption from this corporate operations expenses cap so that they can "participate in the [federal] regulatory process."[16/] It is amazing that these LECs are so bold to assert that other carriers, their competitors, should foot the bill for rural LEC lobbyists. Vanguard and Comcast would certainly appreciate similar largesse on the part of competitors, but understand that all companies have to set their internal priorities and determine how best to represent themselves on issues of importance. Moreover, companies who are to be "on the dole" to the tune of billions of dollars have no right to object to the Commission's placing restrictions on their subsidized corporate overhead, or for that matter on any other subsidized expenditures.

Another issue where rural LECs offer an untenable argument is their insistence that they are entitled to recovery of their embedded costs. Anything less than recovery of embedded costs to rate of return ILECs they contend, is an unconstitutional taking.[17/] The Commission has been unduly sensitive to rural LEC concerns on this issue and has announced its intention to specifically include allowances for the higher operating expenses and lack of economies of scale that, to some degree, characterize rural telephone providers.[18/] Any further accommodations would return the Commission to utilizing an

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at 2.

15/ *See e.g.* Petition of Fidelity Telephone Company at 4; Petition of GVNW Inc. at 10;

16/ *See* Petition of ITCs, Inc. at 11 and at 8.

17/ *See* Rural Telephone Coalition at 11; Petition of Western Alliance at 16.

18/ *See Order* at ¶ 255.

embedded cost model. Accordingly, the Commission should not reconsider its decision to use a pro-competitive forward-looking cost models for rural LECs. The object should be to subsidize only the difference between the actual or incremental costs of expanding the rural LECs networks to serve their customers and the amount of revenues derived from these operations. An embedded cost methodology does not encourage rationale investment, but rather gross expenditures.

Rural LECs also attack as favoritism a bedrock principle of universal service -- competitive neutrality.[19/] The Western Alliance, along with other rural LECs see the Commission as aiding CMRS providers and new entrants to the detriment of rural LECs. Far from having their implicit subsidies drawn out from under them, rural LECs will continue to benefit from a free ride far longer than they should under the FCC's program and likely state programs.[20/] As the FCC properly recognized, the only way to reduce the costs of universal service in the long run is to encourage efficient competition, not to protect inefficient, highly profitable monopolies.[21/]

Finally, the rural LECs attack the notion that USF subsidies should be portable based on a concern that the new entrant will have a windfall if the subsidy is based on rural LEC embedded costs or creamskim customers where an ILEC is under an obligation to rate average over its service area.[22/] These alleged harmful effects are mitigated by the

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19/ *See* Petition of Western Alliance at 3-7.

20/ Rural LECs will have until January 1, 2001 to begin the transition to forward looking recovery of their costs. *See Order* at ¶ 263.

21/ *See Order* at ¶ 224 ("We concur with the Joint Board's finding that the use of forward-looking economic costs as the basis for determining support will send the correct signals for entry, investment and innovation.")

22/ *See* Petition of Rural Telephone Coalition at 8.

Commission's requirement that CLECs provide service throughout an ILEC study areas to receive universal service funding for supported services.[23/] The marketplace reality that CMRS or CLECs might serve some customers in the study area more efficiently than the incumbent rural LECs should not stop the Commission from providing for competitive entry. The FCC should not reconsider its universal service rules to the extent they encourage new entrants to serve the customers of rural LECs. This entry will allow customers in high cost areas to receive service at more efficient prices and therefore lower the costs of universal service. Competitive entry into rural markets will force rural LECs out of their monopolistic complacency, thereby bringing the benefits of competition to the marketplace.

V. CONCLUSION

For the foregoing reasons, Comcast and Vanguard respectfully request that the Commission deny the Petitions for Reconsideration filed in this proceeding to the extent requested in this Opposition.

Respectfully submitted,

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23/ *See* 47 U.S.C. § 214(e)(1).

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August 18, 1997

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, do hereby state that I caused the foregoing "**JOINT OPPOSITION TO PETITIONS FOR RECONSIDERATION**" to be sent by hand-delivery, this 18th day of August, to the following:

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